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Sup. Ct. U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 430

THE UNITED STATES OF AMERICA, PETITIONER

vs.

OGILVIE HARDWARE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1946
CERTIORARI GRANTED OCTOBER 14, 1946

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UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA,
SHREVEPORT DIVISION.

No. 1256 Civil.

OGILVIE HARDWARE COMPANY, INC.,

versus

UNITED STATES OF AMERICA.

TRANSCRIPT OF APPEAL

Taken by Defendant to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

Appearances:
H. C. Walker, Esquire,
Elias Goldstein, Esquire,
Attorneys for Complainant—Appellee.

Malcolm E. Lafargue, Esquire, U. S. District Attorney,
William J. Fleniken, Esquire, Assistant U. S. Attorney,
Attorneys for Defendant—Appellant.

United States District Court, Western District of Louisiana,
Shreveport Division.

Ogilvie Hardware Company, Inc.,
vs. No. 1256.
United States of America.

To the Honorable Judges of the United States District Court for the Western District of Louisiana, Shreveport Division:

The Petition of the Ogilvie Hardware Company, Inc., a corporation organized under the laws of the State of

Louisiana and domiciled in the Parish of Caddo, with respect represents:

1.

This is a suit for refund of income taxes erroneously assessed and the jurisdiction of the Court is derived from Section 24 (20) of the Judicial Code, 28 U. S. C. A., Section 41 (20).

2.

Petitioner was organized a number of years ago and has since its organization conducted a wholesale hardware business in the City of Shreveport. For income tax purposes your petitioner operates on a fiscal year basis instead of a calendar year basis, its fiscal year ending May 31st of each year.

3.

For the fiscal year ending May 31st, 1937 it reported a net income for federal income tax purposes of Twenty-seven Thousand Three Hundred Seventy-eight and 64/100 ($27,378.64) Dollars and paid income tax thereon of Three Thousand Five Hundred Five and 65/100 ($3,505.65) Dollars. The Internal Revenue Department of the United States determined that the income tax return as prepared and submitted by petition was erroneous and that petitioner owed in addition to the amount which it had paid Six Thousand Two Hundred Forty-nine and 21/100 ($6,249.21) Dollars. of which amount Five Thousand Four Hundred Twenty-six and 93/100 ($5,426.93) Dollars represented surtax on undistributed profits.

4.

For the fiscal year ending May 31st, 1938, your petitioner reported a net income of Eighteen Thousand Five Hundred

Forty-six and 96/100 ($18,546.96) Dollars, upon which it paid a tax of Three Thousand Six Hundred Fifty-six and 25/100 ($3,656.25) Dollars. The Internal Revenue Department of the United States held this return likewise to be erroneous and assessed an additional tax of One Thousand Four Hundred Eighty-eight and 86/100 ($1,488.86) Dollars, which likewise represented a surtax on undistributed profits.

5.

Your petitioner paid the deficiency assessment for the fiscal year ending May 31st, 1937, in installments as follows:

August 13th, 1937	$ 45.56
November 15th, 1937	$ 45.56
February 11th, 1938	$ 45.57
May 12th, 1938	$ 45.57
October 5th, 1938	$1,311.17
January 4th, 1939	$1,311.17
April 4th, 1939	$1,311.17
July 5th, 1939	$1,311.16

Your petitioner paid the deficiency assessment against it for the year ending May 31st, 1938 as follows:

August 12, 1938	$372.21
November 14th, 1938	$372.21
February 14th, 1939	$372.22
May 5th, 1939	$372.22

6.

On November 25th, 1942, following the passage of the 1942 Revenue Act by the Congress of the United States

of America, your petitioner filed a claim for refund of these amounts because at the close of its fiscal years ending May 31st, 1936, May 31st, 1937, and May 31st, 1938, it had a large deficit in accumulated earnings and profits, which deficit on each of the three dates named exceeded the total amount of its net income for the fiscal years ending May 31st, 1937 and May 31st, 1938; and petitioner was prohibited by Louisiana law (Act 250 of the Louisiana Legislature for the year 1928) from paying dividends during the existence of such deficit.

7.

Petitioner's claim for refund was approved by the subordinate officials of the Internal Revenue Department to whom it was presented as required by the regulations of the Commissioner of Internal Revenue; but on January 22nd, 1944, petitioner received a communication dated November 25th, 1943, which advised your petitioner that the claim had been rejected in full. Your petitioner promptly filed a protest, requested a hearing which was granted and then filed a supplemental protest; but in spite of these protests the claim for refund was rejected by the Commissioner of Internal Revenue, notice of this rejection being given to your petitioner by a letter dated August 18th, 1944 from Mr. William G. Cullen, Head of the Southwestern Division Technical Staff of the Internal Revenue Department of the United States.

8.

Your petitioner further with respect shows that it had a deficit of Seventy-four Thousand Eight Hundred Seventy-five and 10/100 ($74,875.10) Dollars in accumulated earnings and profits as of the close of its fiscal year ending May [redacted]st, 1936, and that it had a similar deficit at the

close of its fiscal year ending May 31st, 1937 of Seventy-one Thousand Three Hundred Forty-seven and 18/100 ($71,347.18) Dollars; that under the provisions of Act 250 of the Louisiana Legislature for the year 1928, which has been continuously in effect since its enactment and is the general corporation law of Louisiana, it was prohibited from paying dividends during the existence of a deficit in accumulated earnings and profits and was in fact prohibited from paying dividends except out of surplus; and your petitioner shows that at no time during the years 1936, 1937 and 1938 did it have a surplus. Petitioner further shows that the amount of its deficit in accumulated earnings and profits as of the close of the preceding taxable year exceeded its total net income for the fiscal year ending May 31st, 1937, and the amount of its deficit in accumulated earnings and profits as of the close of the fiscal year ending May 31st, 1937, exceeded its net income for the fiscal year ending May 31st, 1938.

9.

A copy of this petition has been sent by registered mail to the Attorney General of the United States of America, Washington, D. C.

Wherefore, your petitioner prays that service be made herein upon the United States of America as provided by law and that a copy of this petition be served upon the United States District Attorney for the Western District of Louisiana and that after all legal delays and due hearing had there be judgment in favor of petitioner and against the United States of America in the full sum of Six Thousand Nine Hundred and Fifteen and 79/100 ($6,915.79) Dollars with interest at the rate of six per cent (6%) per annum upon:

$45.56 from August 13th, 1937,
$45.56 from November 15th, 1937,

$45.57 from February 11th, 1938,
$45.57 from May 12th, 1938,
$1,311.17 from October 5th, 1938,
$1,311.17 from January 4th, 1939,
$1,311.17 from April 4th, 1939,
$1,311.16 from July 5th, 1939,
$372.21 from August 12th 1938
$372.21 from November 14th, 1938,
$372.22 from February 14th, 1939,
$372.22 from May 15th, 1939.

Petitioner further prays for all necessary orders and general relief.

H. C. WALKER, JR.,
(H. C. Walker, Jr.),
424 First National Bank Building,
Shreveport, Louisiana.

ELIAS GOLDSTEIN,
(Elias Goldstein),
Attorneys for Petitioner.
424 First National Bank Building,
Shreveport, Louisiana.

(Affidavit Omitted.)

Filed November 21, 1944. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

ORDER GRANTING EXTENSION OF TIME TO FILE ANSWER OR OTHER PLEADINGS.

No. 1256.

(Titles Omitted.)

On motion of the United States of America and it appearing proper to the Court;

It Is Hereby Ordered that the United States of America, defendant in the above numbered and entitled cause, be granted a further period of sixty (60) days from this day within which to file an answer or other pleadings in this matter.

Thus Done and Signed at Alexandria, Louisiana, on the 16th day of January, 1945.

G. L. PORTERIE,
Judge.

Filed January 17, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

ANSWER.

No. 1256.

(Title Omitted.)

The defendant, United States of America, through its attorneys, Malcolm E. Lafargue, United States Attorney for the Western District of Louisiana, and John A. Patin,

Assistant United States Attorney, answering the complaint:

1.

Admits that this is a suit for refund of income taxes assessed and paid and that the jurisdiction of this Court is based on Section 24(20) of the Judicial Code, 28 U. S. C. A., paragraph 41(20), but denies each and every other allegation of paragraph numbered 1 thereof.

2.

Admits the allegations of paragraph numbered 2 thereof.

3.

Admits that the plaintiff filed an income tax return for the fiscal year ending May 31, 1937, and paid the tax of $3,505.65 shown to be due thereon and that the Internal Revenue Department of the United States determined that the return as filed was erroneous and that the plaintiff owed an additional tax in the amount of $6,249.21, but denies each and every other allegation of paragraph numbered 3 thereof.

Defendant affirmatively alleges that the income tax return filed by the plaintiff showed a net income for excess profits tax purposes of $27,378.64 and a net income for income tax purposes of $27,235.92. Defendant further alleges that of the said additional tax in the amount of $6,249.21 only $5,244.67 represented surtax on undistributed profits instead of the amount of $5,426.93 alleged by plaintiff.

4.

Admits that the plaintiff filed an income tax return for the year ending May 31, 1938, reporting thereon a net

income of $18,546.90 upon which it paid the tax shown thereon to be due in the amount of $3,656.25 and that the Internal Revenue Department of the United States held such return to be erroneous and assessed an additional amount, but denies each and every other allegation of paragraph numbered 4 thereof.

Defendant affirmatively alleges that the additional tax assessed was in the amount of $502.14 plus interest thereon of $37.21 instead of in the amount of $1,488.86 as alleged by the plaintiff in said paragraph numbered 4 thereof.

The defendant further alleges that of the total amount of tax against the plaintiff, including the original tax and the additional tax, $1,488.86 represented a surtax on undistributed profits.

5.

Denies each and every allegation of paragraph numbered 5 thereof.

Defendant affirmatively alleges that the additional tax and interest paid by the plaintiff for the fiscal year ended May 31, 1937, was paid on the following dates and in the following amounts:

October 18, 1938	$1,990.10
January 13, 1939	1,562.31
April 12, 1939	1,562.31
July 14, 1939	1,572.29
July 14, 1939	120.62
Total tax & interest	$6,807.63

Defendant further alleges that the original tax and additional tax for the fiscal year ended May 31, 1938, were paid on the following dates in the following amounts:

Tax Shown to be Due on Return.

August 15, 1938	$ 914.07
November 16, 1938	914.06
February 16, 1939	914.06
May 22, 1939	914.06
Total tax paid	$3,656.25

Additional Tax Paid.

November 25, 1939	$ 162.75
January 27, 1940	125.54
April 4, 1940	125.54
May 28, 1940	125.52
May 28, 1940	7.00
Total paid	$ 546.35

6.

Admits that in November, 1942, the plaintiff filed claims for refund, but denies each and every other allegation of paragraph numbered 6 thereof.

Defendant affirmatively alleges that the said claims for refund were filed on November 27, 1942, instead of on November 25, 1942, as alleged by the plaintiff. Defendant further alleges that a claim in the amount of $5,426.93 was filed for the fiscal year ending May 31, 1937, and a claim for refund in the amount of $1,488.86 was filed for the fiscal year ending May 31, 1938.

7.

Admits that the plaintiff received communications dated November 25, 1943, and August 18, 1944, and that it filed various protests and that in spite of such protests the said claims for refund were rejected by the Commissioner of Internal Revenue, but denies each and every other allegation of paragraph numbered 7 thereof.

The defendant affirmatively alleges that the communication dated November 25, 1943, notified the plaintiff of the rejection of its claim and that the letter dated August 18, 1944, from William G. Cullen, Head of the Southwestern Division, Technical Staff of the Internal Revenue Department of the United States also notified the plaintiff of the rejection of its claims and stated that the statutory notices thereof would be issued in the future.

Defendant further alleges that the Commissioner of Internal Revenue in a registered letter dated November 1, 1944, advised the plaintiff of the rejection of its said claims for refund.

8.

Denies each and every allegation of paragraph numbered 8 thereof.

9.

Admits the allegations of paragraph numbered 9 thereof.

Wherefore, the defendant prays for judgment, dismissing the complaint, together with the costs and disbursements of this action.

MALCOLM E. LAFARGUE,
(Malcolm E. Lafargue),
United States Attorney.
JOHN A. PATIN,
(John A. Patin),
Assistant United States Attorney,
Attorneys for Defendant.

Filed March 13, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

STIPULATION.

No. 1256.

(Titles Omitted.)

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts may be taken as true upon the trial of this case, subject to the right of either party to introduce other and further evidence not inconsistent with any of the facts stipulated herein:

I. The taxpayer, Ogilvie Hardware Company, Inc., is and at all times in question was a corporation organized under the laws of the State of Louisiana and domiciled in the Parish of Caddo in the Western District of Louisiana. It was organized in 1907 under the name of Thomas-Ogilvie Hardware Company, Limited, and changed to its present name about 1926 or 1927. It conducts a whole-

sale hardware business in the City of Shreveport, reports its income on the accrual basis, and operates on a fiscal year basis ending on May 31st of each year.

II. From the date of its organization through 1918 the taxpayer's authorized and outstanding capital stock consisted of 1,000 shares of common stock of a par value of $100 each, or a total of $100,000 par value outstanding.

III. On August 12, 1918, $100,000 par value of 7 per cent preferred stock was authorized, of which $23,000 was issued in 1919 and $15,300 in 1920 for cash.

IV. On July 7, 1924, a 100 per cent dividend in common stock ($100,000 par value) was issued share for share to its common stockholders, thus making a total outstanding common stock of $200,000 which is still outstanding. The stock dividend was charged to surplus on the books of the taxpayer during the fiscal year 1925 (ending May 31, 1925). The surplus of the corporation at the end of the fiscal year ending May 31, 1924 was $149,306.43. After declaring the 100% stock dividend and charging same to surplus and after payment of a cash dividend of $14,681.00, and after giving effect to the earnings for the year ending May 31, 1924, the corporation still had a surplus of $42,229.70.

V. On January 23, 1934, the articles of incorporation were amended so that two classes of preferred stock would henceforth be outstanding. The two classes were to be designated as Class A and Class B. The old preferred stock referred to hereinbefore in paragraph III became the Class B stock.

VI. On April 18, 1934, the corporation being badly in need of a loan borrowed $23,000 from William C. Woolf

and Mable M. Palmer, for which notes of the taxpayer were given, and as a consideration for their making the loan issued to them $23,000 par value of Class C stock. This stock bonus was charged to surplus on taxpayer's books during the fiscal year which ended May 31, 1934. So long as Class A stock remained outstanding, all of the voting rights, control and management of taxpayer were vested in the holders of such stock.

VII. The loans made by Mr. Woolf and Mrs. Palmer were dated April 18, 1934 and were due July 15, 1935, and were eventually paid in full during the fiscal years ending 1937 and 1938. Part of the Class A preferred stock issued to Mr. Woolf and Mrs. Palmer as a bonus was redeemed in 1940 and 1941 and the remainder was redeemed in 1943 and 1944.

VIII. The taxpayer's books on May 31, 1936 disclosed a deficit of $74,875.10, its net operating losses since the declaration of the stock dividend having been, together with the $23,000 paid as a bonus for the loan made by Mr. Woolf and Mrs. Palmer, sufficient to convert the 1924 surplus into this deficit on May 31, 1936. Likewise, the taxpayer's books showed an operating deficit of $71,347.18 on May 31, 1937 and an operating deficit of $60,923.58 on May 31, 1938.

IX. The dispute in this case relates entirely to the right of the taxpayer to take into consideration in determining the amount of its surplus or deficit, as the case might be, the $100,000 common stock dividend and the $23,000 stock bonus.

X. On August 14, 1937, the taxpayer filed with the Collector of Internal Revenue for the District of Louisiana a corporation income and excess profits tax return for the

fiscal year ending May 31, 1937, showing an income tax of $3,362.93 and excess profits tax of $142.72, or a total of $3,505.65, to be due, which amounts were thereafter paid and are not in issue here.

Upon an examination of the return the Commissioner of Internal Revenue made certain adjustments and assessed additional taxes of $6,249.21, of which $5,426.93 consisted of a surtax on undistributed profits. The records of the Collector of Internal Revenue show that the additional taxes plus interest were paid on the following dates in the following amounts:

October 18, 1938	$1,990.10
January 13, 1939	1,562.31
April 12, 1939	1,562.31
July 14, 1939	1,572.29
July 14, 1939	120.62
	$6,807.63

XI. On August 15, 1938, the taxpayer filed its corporation income and excess-profits tax return for the fiscal year ending May 31, 1938, showing total taxes due of $3,656.25. The records of the Collector's office show such taxes to have been paid as follows:

August 15, 1938	$914.07
November 16, 1938	914.06
February 16, 1939	914.06
May 22, 1939	914.06
	$3,656.25

As a result of an examination of the said return the Commissioner made certain adjustments and assessed additional taxes of $502.14. According to the records of the

Collector's office, the additional taxes with interest thereon were paid as follows:

October 25, 1939	$162.75
January 27, 1940	125.54
April 4, 1940	125.54
May 28, 1940	125.52
	$539.35

Of the total amount of taxes paid by taxpayer for the said fiscal year 1938, $1,488.86 consisted of surtax on undistributed profits. The taxpayer asserts that the amount of $1,488.86 was paid as follows, as evidenced by photostatic copies of the original checks issued by it which are attached hereto and marked "Exhibit B":

August 12, 1938	$ 372.21
November 14, 1938	372.21
February 14, 1939	372.22
May 15, 1939	372.11
	$1,488.86

XII. On November 27, 1942, following the enactment of the Revenue Act of 1942, and particularly of Section 501 (c) thereof, the taxpayer filed claims for refund of surtax on undistributed profits in the amounts of $5,426.98 and $1,488.86 for the fiscal years ending May 31, 1937 and May 31, 1938, respectively. The claims were based on the ground that the taxpayer had a continuous deficit in accumulated earnings and profits on May 31, 1936, on May 31, 1937 and on May 31, 1938, which deficit on each of the three dates named exceeded the total amount of its net income for the fiscal years ending with those dates, and was thus prohibited by Louisiana law from paying dividends.

Under date of November 1, 1944, the Commissioner of Internal Revenue, by a registered letter, notified the taxpayer of the rejection of its said claims in full.

XII. If the Court decides that the taxpayer is entitled to any recovery, whether of the entire amount sought or of a lesser amount, computations will be submitted by the parties to the Court for its determination as to the correct amount of recovery.

ELIAS GOLDSTEIN,
Attorney for Plaintiff.
MALCOLM E. LAFARGUE,
United States Attorney,
Attorney for United States.

Filed July 11, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

OPINION OF JUDGE.

No. 1256.

(Titles Omitted.)

DAWKINS, J.:

The facts in this case are not disputed and are as follows:

The Ogilvie Hardware Company was incorporated in 1907 with a capital stock of 1000 shares of the par value of $100,000.00, issued and outstanding; and on August 12, 1918, $100,000.00 of seven per cent preferred stock was authorized, of which $23,000.00 was issued in 1919 and $15,300.00 in 1920. At the end of the fiscal year, May 31, 1924, the corporation had a surplus of $149,306.43, out of which it declared a stock dividend of 100 per cent and

issued to its shareholders and additional 1000 shares of common stock of the part value of $100,000.00. At the same time it declared a cash dividend of $14,681.00, thus leaving in its surplus the sum of $42,229.70. January 23, 1934, the charter was amended so as to establish two classes of preferred stock, A and B, and the preferred stock authorized and issued on August 12, 1918, became Class B.

On April 18, 1934, the corporation being "badly in need of a loan" borrowed from individuals the sum of $23,000.00, represented by note and, as a bonus or further consideration for the loan, there was issued to the lenders Class A preferred stock of the par value of $23,000.00, which carried with it full voting rights with respect to control and management. The loans of $23,000.00 were due July 15, 1935, but were paid in full "during the fiscal years ending in 1937 and 1938." The preferred stock issued to the lenders was redeemed "partly in 1940 and 1941 and the remainder * * * in 1943 and 1944."

The taxpayer's books, at the end of the fiscal year of May 31, 1936, showed a deficit of $74,875.10, which included "net operating losses since the declaration of the stock dividend in 1924" and the $23,000.00 paid as a bonus in preferred stock Class A in 1934, charged at the time to surplus, but subsequently redeemed as above stated. The books also showed operating deficits in the fiscal years of May 31, 1937 of $71,347.18 and of May 31, 1938, of $60,923.58.

Stipulation IX recites:

"The dispute in this case relates entirely to the right of the taxpayer to take into consideration in determining the amount of its surplus or deficit, as the case might be, the $100,000 common stock dividend and the $23,000 stock bonus."

The taxpayer returned and paid for the year 1937 an income tax in the amount of $3,362.93 and a profits tax of $143.72, or a total of $3,505.65, and for the year 1938 total taxes of $3,656.25. The Commissioner, on examination of the returns of 1937, assessed additional taxes of $6,249.21, of which $5,426.93 consisted of a surtax on undistributed profits, which was paid. A similar reassessment for 1938 resulted in the imposition of additional taxes in the sum of $502.14, which were also paid. Of the total taxes paid for 1938, "$1,488.86 consisted of surtaxes on undistributed profits".

After the passage on November 27, 1942, of the Revenue Act for that year, particularly Section 501(c), the taxpayer filed claims for "refunds of surtaxes on undistributed profits in the amounts of $5,426.93 and $1,488.86 for the fiscal years ending May 31, 1937 and May 31, 1938, respectively * * * on the ground" that the taxpayer had a continuous deficit in accumulated earnings and profits on May 31, 1936, on May 31, 1937, and on May 31, 1938, which deficits, on each of the three dates named, exhausted the total amount of its income for those fiscal years, and it was thus prohibited by the Louisiana law from paying dividends. The claims having been denied, this suit was instituted to recover the full amount of the alleged overpayments, totaling $6,915.79, with six per cent interest from date of each payment.

There are three points of law involved, which, in substance, are as follows:

1st. Whether the stock dividend of 1924 can be said to have diminished the accumulated earnings and profits of the taxpayer within the meaning of Section 26 (c) (3) of the Revenue Act of 1936, as amended by Section 501 of the Revenue Act of 1942;

2nd. Whether within the meaning of the statute as amended "the taxpayer was prohibited by state law from

paying dividends for the fiscal years ending May 31, 1937 and May 31, 1938"; and

3d. If recovery is allowed, from what dates interest should be figured.

Prior to 1936, corporations had been able to escape taxation upon much of their earnings and profits by declaring "stock dividends". The Revenue Act of that year (C. 690, Secs. 13 and 14) imposed income and surtaxes upon the undistributed profits of the corporation, and Section 26 provided the credits which might be taken thereon, among which was (c)(2):

"Disposition of profits of taxable year. An amount equal to the portion of the earnings and profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt; to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word "debt" does not include a debt incurred after April 30, 1936."

In order to make clear its purpose to tax undistributed income and profits, the Revenue Act of 1936, Ch. 690, Sec. 115 (h), provided:

"Effect on Earnings and Profits of Distribution of Stock.—The distribution (whether before January 1, 1936, or on and after such date) to a distributee by or on behalf

of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—

"(1) If no gain to such distributee from the receipt of such stock or securities was recognized by law, or

"(2) If the distribution was not subject to tax in the hands of such distributee it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under sections 115(f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act. * * *."

The amendment of 1942 was expressly made retroactive and effective as of "the date of the enactment of the Revenue Act of 1936" and any "over-payment shall be refunded or credited in the same manner as in the case of an income tax erroneously collected under the Revenue Act of 1936 * * *." At the time of the stock dividend in the present case in 1924, the revenue law of that year had specifically provided (Sec. 201(f), C. 234, 43 Stat. 253) that stock dividends should not be taxable. It had long since been decided by the Supreme Court (March 8, 1920) that a stock dividend could not constitutionally be taxed in the hands of a stockholder. Eisner vs. McComber, 252 U. S. 189, and, as stated earlier, the Revenue Act of 1936 was a deliberate attempt to reach undistributed profits of all kinds, including those represented by stock dividends, at least from the passage of that law. At the same time it was recognized that there would be instances where the income of the corporation would be pledged by written contracts to pay debts, such as bond issues, etc.; and, hence, that it should not be penalized for failure to distribute income so bound, to its stockholders.

In the case of Helvering, Comm. vs. Northwest Steel Mills, 311 U. S. 45, the Supreme Court decided that such credit could not be taken for that portion of the income or undivided profits which the corporation was prohibited from distributing under state law, but only so much as was covered by "provision of a written contract" as provided in subsections (c) (1) and (c)(2) of Sec. 26 of the Revenue Act of 1936, and that restrictions contained in the charter against the declaration of dividends were not such a contract within the meaning of the statute (as between the state and corporation).

Thereafter the Revenue Act of 1942, Sec. 501, (C. 619, 56 Stat. 798, Sec. 26(c)) amended the Revenue Act of 1936 to read as follows:

"(c) Restrictions on Payment of Dividends.—"; * * *

"(c) Deficit Corporations.—In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936."

After the Supreme Court had decided in the Northwest Steel Mills case, supra, that a corporation could not take credit for income on profits which it was prohibited from distributing under state law or the provisions of the Revenue Act of 1936, Congress, in the passage of the Revenue Act of 1942, drew a "deadline", so to speak, which had the effect of allowing such credits under any such law or order of any public regulatory body "which was in effect prior to May 31, 1936".

Apparently, it saw the possibility of the states or other regulatory bodies passing such laws when they did not

exist on that date. There was no attempt to define or distinguish as between the reasons or grounds by which distribution might be prohibited by state law.

At the time of the stock dividend in this case in 1924, some twelve years before the passage of the Revenue Act of 1936, it was both lawful and justified under the financial condition of the corporation, to declare dividends in stock. There is nothing in the stipulation of facts to question the good faith of the parties or that this stock was treated and handled the same as that originally subscribed insofar as participation in management, profits, etc., or the power of the holders to sell and dispose of it. Its surplus was adjusted by charging it with the value of the additional stock so issued, and continuously thereafter, until the assessment of the deficiencies in 1937 and 1938, its books showed only such surpluses and undivided profits as accrued from year to year without consideration of the $100,000.00 which had represented the stock dividend back in 1924.

Act 250 of the Louisiana Legislature for the year 1928 declares:

"No corporation shall pay dividends in cash or property,

"(a) Except from the surplus of the aggregate of its assets over the aggregate of its liabilities, plus the amount of its capital stock."

This is unquestionably a statutory prohibition against the distribution of the income of a corporation as divdends, without taking into consideration, as against its assets and surplus, the par value of its entire stock as a liability. To this extent, the plaintiff was a "deficit corporation" within the meaning of Section 14 (a) (3) of the Revenue Act of 1936, as amended by Section 51 of the Revenue Act of 1942, 56 Stat. 954.

Numerous authorities are cited on points which appear not to be disputed. However, the two cases most nearly in point are Century Electric Co. vs. Comm., (9th Cir.), 144 Fed. (2d) '983, relied upon by the Government, and Glenn, Collector, vs. Byron Sash and Door Co., (6th Cir.), decided June 18, 1945, not yet reported, cited by plaintiff.

The Court in the first case rests its affirmance of the Tax Court's decision, disallowing a credit for the stock issued against surplus, upon the provisions of Section 115 (h) of the Revenue Act of 1936, declaring that the distribution of non-taxable stock dividends was not to be considered a distribution of earnings, without discussing at least the effect of the amendment of 1942 permitting the taking of credit for earnings or profits which the corporations were prohibited from distributing under the state law.

In the latter, or Byron Sash and Door Co. case, however, in a factual situation very similar to that of the prese t case, the Court went at length into the reasons, intents and purposes of the amendment, and reached a conclusion directly opposite to that in the former. The Court, in this latter case, points out that the deficit was caused by losses over a period of seven years subsequent to the conversion of that part of the surplus into capital stock by the issuance of the stock dividend; whereas, in Century Electric Company, the deficit arose from the acts of the corporation in issuing the stock dividends in those identical years, 1936 and 1937, against earnings and profits. Attention was called to the fact that Section 115(h) of the Revenue Act of 1936 "deals with the factual status of the stockholder who receives the dividend rather than with the liability of the corporation for taxes, and to use this provision of the statute in order to ignore the deficit * * * seems untenable. Moreover, it is based on a false premise, that the deficit was caused by the distribution of the dividends. Actually, the deficit was caused by seven continuous years of operating losses."

Here, too, the deficit arises, not from the stock dividend of some twelve years before, when the corporation was prosperious and fully justified in declaring it, but from operating losses occurring largely in the depths of the depression of the early 1930's.

The discussion and citation of authorities in the Byron Sash and Door Company case are so exhaustive I do not feel that anything could be added by a repetition of those views here. My conclusion is that the plaintiff should recover.

Interest should be calculated from the various dates on which the instalment paid exceeded the taxes actually due. Blair vs. Birkenstock, 271 U. S. 348.

Proper decree should be presented.

Thus Done and Signed in Chambers at Monroe, Louisiana, on this the 2 day of October, 1945.

BEN C. DAWKINS,
United States District Judge.

Filed October 3, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

PETITION FOR REHEARING.

No. 1256.

(Titles Omitted.)

To the Honorable Judges of this Court:

Comes now the United States of America, through Malcolm E. Lafargue, United States Attorney, and William J. Fleniken, Assistant United States Attorney, in the above entitled cause, and presents this, a petition for a re-

hearing of the above entitled cause, and, in support thereof, respectfully shows:

1.

That the judgment is contrary to the law and the evidence.

Wherefore, it is respectfully urged that this petition for a rehearing be granted and that the judgment of this Court be upon further consideration reversed.

Respectfully submitted,
UNITED STATES OF AMERICA,
MALCOLM E. LAFARGUE,
(Malcolm E. Lafargue),
United States Attorny,
WILLIAM J. FLENIKEN,
(William J. Fleniken),
Assistant United States
Attorney.

Filed October 18, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

MINUTE ENTRY.

Shreveport, Louisiana, Wednesday, December 12, 1945.

Court met pursuant to adjournment at 11 A. M.

Present: Hon. Ben C. Dawkins, Judge, presiding, and other Court Officials.

Ogilvie Hardware Company,
vs. No. 1256 Civil.
United States of America.

It was ordered by the Court that the Motion filed by the United States for a new trial be overruled.

Ordered that Court be adjourned.

JUDGMENT.

No. 1256.

(Titles Omitted.)

In this case, by reason of the law and evidence being in favor thereof, and for the reasons given in the written opinion herein filed,

It Is Ordered, Adjudged and Decreed that the plaintiff, Ogilvie Hardware Company, Inc., do have and recover judgment against the defendant, the United States of America, in the full sum of Six Thousand Nine Hundred Fifteen and 79/100 ($6,915.79) Dollars with interest there-

on at the rate of six per cent (6%) per annum calculated as follows:

On $ 609.40 from October 18th, 1938;
On $1,562.31 from January 13th, 1939;
On $1,562.31 from April 12th, 1939;
On $1,692.91 from July 14th, 1939;
On $ 202.58 from February 16th, 1939;
On $ 372.22 from May 15th, 1939;
On $ 914.06 from May 22nd, 1939.

This Done and Signed on this the 18th day of October, 1945.

BEN C. DAWKINS,
Judge, United States District Court, Western District of Louisiana, Shreveport Division.

Filed October 18, 1945. Philip H. Mecom, Clerk, U. S. District Court, West. Dist. of Louisiana.

NOTICE OF APPEAL.

In the United District Court for the Western District of La., Shreveport Division.

Ogilvie Hardware Company,
vs. Civil Action No. 1256.
United States of America.

Notice is hereby given that the United States of America, the above named defendant, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from

the final judgment entered in this action on October 18, 1945.

MALCOLM E. LAFARGUE,
(Malcolm E. Lafargue),
United States Attorney,
WILLIAM J. FLENIKEN,
(William J. Fleniken),
Assistant United States
Attorney.

U. S. District Court, Western District of Louisiana. Filed Jan. 17, 1946. Philip H. Mecom, Clerk, By ....., Deputy.

DESIGNATION OF RECORD.

In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

Ogilvie Hardware Company, Inc.,
vs. Civil Action No. 1256.
United States of America.

Appellant designates the entire record to be contained in the record on appeal in this action.

MALCOLM E. LAFARGUE,
(Malcolm E. Lafargue),
United States Attorney,
WM. J. FLENIKEN,
(William J. Fleniken),
Assistant United States
Attorney.

I hereby certify that a copy of the above and foregoing designation has this day been mailed to Mr. Elias Gold-

stein, Attorney for Ogilvie Hardware Company, First National Bank Bldg., Shreveport, Louisiana.

WM. J. FLENIKEN.

U. S. District Court, Western District of Louisiana. Filed Feb. 4, 1946. Philip H. Mecom, Clerk, By ..... Deputy.

MOTION AND ORDER.

In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

Ogilvie Hardware Company, Inc.,
vs. Civil Action No. 1256.
United States of America.

To the Honorable Judges of this Court:

Comes now the United States of America through Malcolm E. Lafargue, United States Attorney, and William J. Fleniken, Assistant United States Attorney, in the above entitled cause and respectfully shows:

1.

That the judgment was signed by the Honorable Court in the above entitled and numbered cause at Shreveport on October 18, 1945, and filed in the office of the Clerk of this Court at Shreveport on the same date;

2.

That on October 18, 1945, petition for rehearing was filed, and overruled on December 12, 1945;

3.

That on January 17, 1945, appellant filed notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit;

4.

That on February 1, 1946, appellant filed its designation of the record on appeal herein;

5.

That the Clerk will be unable to complete the preparation of the record on appeal within the statutory period of forty days from the filing of such notice of appeal, for the reason that other work and matters must first be attended to;

Wherefore, appellant moves the Court for an order extending the time within which the record on appeal herein may be filed and the appeal designated in the said United States Court of Appeals for the Fifth Circuit for the period of ninety days from date of filing of said notice of Appeal, January 17, 1946.

MALCOLM E. LAFARGUE,
(Malcolm E. Lafargue),
United States Attorney,
WILLIAM J. FLENIKEN,
(William J. Fleniken),
Assistant United States
Attorney.

ORDER.

The above and foregoing motion considered,

It Is Hereby Ordered that the period of time within which the record of appeal in the above entitled and numbered cause may be filed and the appeal designated in the United States Circuit Court of Appeals for the Fifth Circuit is hereby extended for the period of ninety days from January 17, 1946, date that the notice of Appeal was filed in said cause.

Thus Done and Signed this 5th day of February, 1946.

BEN C. DAWKINS,
Judge.

U. S. District Court, Western District of Louisiana. Filed Feb. 6, 1946. Philip H. Mecom, Clerk, By M. E. H., Deputy.

CLERK'S CERTIFICATE.

I, PHILIP H. MECOM, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the foregoing twenty-eight (28) pages contain and form a full, true, correct and complete transcript of the record, and all proceedings had in a cause entitled Ogilvie Hardware Co., Inc. v. United States of America, No. 1256 on the Civil Docket of said Court, as fully as the original of same remains on file and of record in this office, at Shreveport, Louisiana, the said transcript having been prepared in accordance with Designation filed by counsel in said cause, a copy of which accompanies this transcript.

Witness my official hand and the seal of said Court, at the City of Shreveport, Louisiana, this the 22nd day of March, A. D. 1946.

PHILIP H. MECOM,
(Seal) Clerk,
By MINA E. HOLT,
Deputy Clerk.

Argument and submission

Extract From the Minutes of May 15th, 1946

No. 11609

UNITED STATES OF AMERICA

vs.

OGILVIE HARDWARE COMPANY, INC.

On this day this cause was called, and, after argument by Robert R. Reynolds, Jr., Esq., Special Assistant to the Attorney General, for appellant, and Elias Goldstein, Esq., for appellee, was submitted to the Court.

Opinion of the court

Filed May 24, 1946

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11609

UNITED STATES OF AMERICA, APPELLANT

vs.

OGILVIE HARDWARE COMPANY, INC., APPELLEE

Appeal from the District Court of the United States for the Western District of Louisiana

(May 24, 1946)

Before SIBLEY, HUTCHESON, and WALLER, Circuit Judges

SIBLEY, Circuit Judge: The suit in the district court was to recover undistributed profits taxes unlawfully exacted from Ogilvie Hardware Company for fiscal years ending May 31, 1937 and 1938. The unlawfulness of the exaction was asserted to arise out of the refusal to allow the credit provided by the Revenue Act of 1942 (56 Stats. 798), Section 501, which retroactively amended Section 26 of the Revenue Act of 1936. On stipulated facts the district court held the credit allowable, and gave judgment for the Company. The United States appeals.

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The important facts are that the Ogilvie Hardware Company was organized under the laws of Louisiana in 1907, and has since done business in that State. Originally its capital stock was 1,000 shares common stock, total par value being $100,000. In July 1924, having a surplus of $149,306, it paid a 100% dividend in common stock, $100,000, and also a cash dividend, both being charged out of the surplus and leaving $42,229 as surplus. In 1934 money had to be borrowed and $23,000 more preferred stock was issued as a bonus to the lender. On May 31, 1936, the taxpayer's books disclosed a deficit of $74,875. On May 31, 1937, the deficit was $71,347; and May 31, 1938, $60,923. It is stipulated that the sole question is whether the taxpayer can use the $100,000 common stock dividend and the $23,000 preferred stock bonus, as it did, in showing these deficits. In argument it is conceded that if the stock dividend of $100,000 is to be availed of, the preferred stock may be disregarded, because the deficits would exist without it. The district court, 62 Fed. Sup. 338, held that under the law of Louisiana the Company could not in the tax years pay out its current profits so long as the deficit existed, and that under the 1942 amendment it was entitled to the credit claimed, following Glenn, Collector, vs. Byron Sash and Door Co. (6 Cir.), 150 Fed. (2) 44; and distinguishing on its facts Century Electric Co. vs. Commission (9 Cir.), 144 Fed. (2) 983.

On reading the report of the last mentioned case in the Tax Court, 3 T. C. 297, we are not sure that the distinction exists which the Sixth Circuit Court in the Byron Sash and Door Company case thought existed, and which is indicated by the language of the opinion in the Century Electric Company case. We are therefore dealing with the question as we see it, rather than on authority.

By the Revenue Act of 1936, Section 14, a heavy surtax was laid on corporations on their "undistributed net income," the purpose being to force the payment of dividends so that the dividends might be taxed again as income to the shareholders. Section 26 (1) and (2), however, nullified the surtax by a credit to the extent that distribution of the corporate income was prevented by contracts executed prior to May 1, 1936. The Supreme Court held that this credit did not extend to any prevention except by contracts exactly as described in the Section, and that a prevention by the State law under which the corporation exists and acts was not enough. Helvering vs. Northwest Mills, 311 U. S. 46. Because of and to remedy this, the amendment of 1942 was made which retroactively controls here. The words to be construed, extending the cases of credits under Section 26, are: "3. Deficit Corporations. In the case of a corporation having a

deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936." Section 26 of the Louisiana Corporation Law (Louisiana Acts of 1928, p. 424) provides that no corporation shall pay dividends in cash or property "except from the surplus of the aggregate of its assets over the aggregate of its liabilities plus the amount of its capital stock," and expressly excludes from the surplus a number of unrealized values such as appreciation in real estate not sold, profits on notes purchased which have not accrued or been realized, and the like. It is plain that all the capital stock must be treated as a liability in determining whether there is a surplus of assets over liabilities out of which a cash dividend can be paid. If there is a deficit instead of a surplus no cash dividend is lawful. This law was in effect eight years before May 1, 1936. The district court rightly held that the increase in capital stock by the stock dividend in 1924, lawfully made, increased the capital stock of the Company, and the additional stock must be included with the other stock and liabilities in determining whether there was a dividend surplus, and that, there being no question about the aggregate of the assets, the State law prevented the payment of dividends in the tax years.

Turning to the words in the federal amendment, "A deficit in accumulated earnings and profits," they are not specially defined and ought to have their natural, common meaning. They occur twice in the single clause of the amendment. In the second occurrence the context is, "the corporation is prohibited by law from paying dividends during the existence of a deficit in accumulated earnings and profits." Clearly the deficit here referred to is that which the State law makes a deficit in prohibiting the payment of dividends. We see no propriety in constructing a different meaning in their first occurrence, "In the case of a corporation having a deficit in accumulated earnings and profits." It is he same corporation in the same condition that is referred to. A corporation which exists under Louisiana law and has a deficit and not a surplus under that law and is thereby prevented from paying dividends, is a corporation protected by the amendment. There is no justification for saying that in the last quoted phrase the deficit meant is that which may be figured by adding all the earnings and profits the corporation has made since its beginning and subtracting only what has been paid out in taxable dividends. The remedy expressed by the amendment is to give to prevention by a law made before May 1, 1936, the same

effect that prevention by a contract executed before that date is given in relieving from the surtax on nondistribution of current earnings and profits.

That divergent meanings be given the same words in the beginning and end of the same clause is said to be required because the Committee which recommended the amendment to the Senate, after stating the object of the amendment as we have just stated it, illustrated its operation by two examples, in the latter of which it was indicated that when "the deficit on the corporation's books was by reason of a prior capitalization of surplus in the course of a nontaxable reorganization" the deficit, so far as thus caused, would not be recognized though it might be by the State law. This example was copied into the Regulations also. It actually speaks only of reorganizations and not of stock dividends. We do not think the example is any part of the unambiguous Act of Congress. It is merely the opinion of the writer of the report on how the legislation would work out in the case of a nontaxable reorganization. The Constitution, Article 1, Section 7, states how the laws of the United States are made: by written Bill, passed by the House and Senate separately, transmitted to the President and approved by him, or passed over his veto. The provision is express that thus "the same [the Bill] shall be a Law". The report of a Committee of the Senate is not voted on—perhaps not read by—the members even of the Senate; but the words of the Bill are. The Bill is transmitted to the House, and it—not the Committee's report—is passed there. The Bill is then sent to the President for his approval. He does not approve a Committee report, if by any chance he should see it. He approves the words of the Bill and it becomes the law. Under the statutes on the subject the Bill as soon as passed by either House is printed and becomes the authentic Bill: 1 U. S. C. A. § 26. On final passage and printing, 44 U. S. C. A. § 196, the printed Acts are evidence of the laws passed; 1 U. S. C. A. § 30. The words of the Act are the law. Only when the words of the law are difficult of understanding can what happened in passing it be resorted to for aid. Its clear meaning cannot be so altered. Nor can anything be thus added to it. Nor can putting an example into the Regulation add to or change the law as passed.

So recourse is had to Section 115 (h) of the Revenue Act of 1936, in substance stating that a distribution by or on behalf of a corporation shall not be considered a distribution of earnings and profits of the corporation if no gain to such distributee was recognized by law or if the distribution was not subject to tax because it did not constitute income to him within the meaning of the Sixteenth Amendment. This Section has reference not to the taxes or credits of the corporation, but only to the taxation of the shareholder, as a reading of the whole Section will show. Subsection (h) means

that when the shareholder gets something in the way of a dividend which is not presently taxable, it will be held taxable as a dividend when the impediment is removed, or the value which he has received is finally realized. Thus in Eisner vs. McComber, 252 U. S. 189, a stock dividend, which is a capitalization of earnings and profits of the corporation, was held not presently taxable to the shareholder because he had not realized any gain; but when on the liquidation of the corporation, or by sale of his stock he does realize the gain, it is all then taxable to him as gain. We do not think this provision has any bearing on the 1942 amendment under discussion which relates to the taxation of the corporation itself for not distributing its current income.

If the deficit of this Company had been caused directly by a stock dividend, as the language of the court in Century Electric Co. vs. Commissioner, supra, indicates the court there thought, we might agree that the Company could not secure the credit by such an act. But the stock dividend here was lawfully accomplished in 1924, twelve years before this surtax on undistributed profits ever existed. Since 1924 this $100,000 has from the corporate standpoint been irrevocably taken out of distributable earnings and profits, or surplus, and has been capital, which could not according to the law recognized in Eisner vs. McComber, supra, and all the authorities, be distributed to shareholders unless on due proceedings to reduce the capital stock. There was then left a substantial surplus. This was lost and the deficit created in the depression years by operating losses. We hold this corporation was entitled to the credit against surtax in the tax years here involved, and the judgment is affirmed.

Teste:

Judgment

Extract from the Minutes of May 24th, 1946

No. 11609

UNITED STATES OF AMERICA

vs.

OGILVIE HARDWARE COMPANY, INC.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Clerk's certificate

United States of America, United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 34 to 42 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11609, wherein United States of America is appellant, and Ogilvie Hardware Company, Inc., is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 33 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of July, A. D. 1946.

[SEAL]

(s) OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

No. 430 —, October Term, 1946

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE 1946